

# Senate Bill 528

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Criminal Defense Lawyers Association)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires superintendent of state hospital or director of equivalent facility to include written evaluation with notification to court of criminal defendant's fitness or lack of fitness to proceed to trial. Prohibits superintendent or director from returning defendant to committing jurisdiction prior to submission of written evaluation.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to criminal defendant's fitness to proceed; amending ORS 161.370; and declaring an emer-  
3 gency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 161.370 is amended to read:

6 161.370. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be de-  
7 termined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the  
8 finding of the report filed by a psychiatrist or psychologist under ORS 161.365, the court may make  
9 the determination on the basis of such report. If the finding is contested, the court shall hold a  
10 hearing on the issue. If the report is received in evidence upon such hearing, the party who contests  
11 the finding thereof shall have the right to summon and to cross-examine any psychiatrist or psy-  
12 chologist who submitted the report and to offer evidence upon the issue. Other evidence regarding  
13 the defendant's fitness to proceed may be introduced by either party.

14 (2) If the court determines that the defendant lacks fitness to proceed, the proceeding against  
15 the defendant shall be suspended, except as provided in subsection (12) of this section, and the court  
16 shall commit the defendant to the custody of the superintendent of a state mental hospital desig-  
17 nated by the Department of Human Services if the defendant is at least 18 years of age, or to the  
18 custody of the director of a secure intensive community inpatient facility designated by the De-  
19 partment of Human Services if the defendant is under 18 years of age, or shall release the defendant  
20 on supervision for as long as such unfitness shall endure. The court may release the defendant on  
21 supervision if it determines that care other than commitment for incapacity to stand trial would  
22 better serve the defendant and the community. It may place conditions which it deems appropriate  
23 on the release, including the requirement that the defendant regularly report to the Department of  
24 Human Services or a community mental health and developmental disabilities program for exam-  
25 ination to determine if the defendant has regained capacity to stand trial. When the court, on its  
26 own motion or upon the application of the superintendent of the hospital or director of the secure  
27 intensive community inpatient facility in which the defendant is committed, a person examining the  
28 defendant as a condition of release on supervision, or either party, determines, after a hearing, if a  
29 hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be  
30 resumed. If, however, the court is of the view that so much time has elapsed since the commitment

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 or release of the defendant on supervision that it would be unjust to resume the criminal proceeding,  
2 the court on motion of either party may dismiss the charge and may order the defendant to be dis-  
3 charged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170 or 427.235  
4 to 427.290.

5 (3) The superintendent of a state hospital or director of a secure intensive community inpatient  
6 facility shall cause the defendant to be evaluated within 60 days from the defendant's delivery into  
7 the superintendent's or director's custody, for the purpose of determining whether there is a sub-  
8 stantial probability that, in the foreseeable future, the defendant will have the capacity to stand  
9 trial.

10 (4) **The superintendent or director may not cause the defendant to be delivered to a**  
11 **county jail or other facility within the jurisdiction in which the defendant has been charged**  
12 **criminally until the superintendent or director has submitted the written evaluation or re-**  
13 **port required by paragraph (c) of this subsection to the court.** *[In addition,]* The superintendent  
14 or director shall:

15 (a) Immediately notify the committing court if the defendant, at any time, gains or regains the  
16 capacity to stand trial or will never have the capacity to stand trial.

17 (b) Within 90 days of the defendant's delivery into the superintendent's or director's custody,  
18 notify the committing court that:

19 (A) The defendant has the present capacity to stand trial;

20 (B) There is no substantial probability that, in the foreseeable future, the defendant will gain  
21 or regain the capacity to stand trial; or

22 (C) There is a substantial probability that, in the foreseeable future, the defendant will gain or  
23 regain the capacity to stand trial. If such a probability exists, the superintendent or director shall  
24 give the court an estimate of the time in which the defendant, with appropriate treatment, is ex-  
25 pected to gain or regain capacity.

26 (c) **Provide the court with a written evaluation or report that includes the basis for the**  
27 **conclusions contained in the notification required by this subsection and subsection (5) of**  
28 **this section.**

29 (5) If the superintendent or director determines that there is a substantial probability that, in  
30 the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless the court  
31 otherwise orders, the defendant shall remain in the superintendent's or director's custody where the  
32 defendant shall receive treatment designed for the purpose of enabling the defendant to gain or re-  
33 gain capacity. In keeping with the notice requirement under subsection (4)(b) of this section, the  
34 superintendent or director shall, for the duration of the defendant's period of commitment, submit  
35 a progress report to the committing court, concerning the defendant's capacity or incapacity, at  
36 least once every 180 days as measured from the date of the defendant's delivery into the super-  
37 intendent's or director's custody.

38 (6) A defendant who remains committed under subsection (5) of this section shall be discharged  
39 within a period of time that is reasonable for making a determination concerning whether or not,  
40 and when, the defendant may gain or regain capacity. However, regardless of the number of charges  
41 with which the defendant is accused, in no event shall the defendant be committed for longer than  
42 whichever of the following, measured from the defendant's initial custody date, is shorter:

43 (a) Three years; or

44 (b) A period of time equal to the maximum sentence the court could have imposed if the de-  
45 fendant had been convicted.

1 (7) The superintendent or director shall notify the committing court of the defendant's impending  
2 discharge 30 days before the date on which the superintendent or director is required to discharge  
3 the defendant under subsection (6) of this section.

4 (8) When the committing court receives a notice from the superintendent or director under ei-  
5 ther subsection (4) or (7) of this section concerning the defendant's progress or lack thereof, the  
6 committing court shall determine after a hearing, if a hearing is requested, whether the defendant  
7 presently has the capacity to stand trial.

8 (9) If under subsection (8) of this section the court determines that the defendant lacks the ca-  
9 pacity to stand trial, the court shall further determine whether there is a substantial probability  
10 that the defendant, in the foreseeable future, will gain or regain the capacity to stand trial and  
11 whether the defendant is entitled to discharge under subsection (6) of this section. If the court de-  
12 termines that there is no substantial probability that the defendant, in the foreseeable future, will  
13 gain or regain the capacity to stand trial or that the defendant is entitled to discharge under sub-  
14 section (6) of this section, the court shall dismiss, without prejudice, all charges against the de-  
15 fendant and:

16 (a) Order that the defendant be discharged; or

17 (b) Initiate commitment proceedings under ORS 426.070 or 427.235 to 427.290.

18 (10) All notices required under this section shall be filed with the clerk of the court and deliv-  
19 ered to both the district attorney and the counsel for the defendant.

20 (11) If the defendant regains fitness to proceed, the term of any sentence received by the de-  
21 fendant for conviction of the crime charged shall be reduced by the amount of time the defendant  
22 was committed under this section to the custody of a state mental hospital, or to the custody of a  
23 secure intensive community inpatient facility, designated by the Department of Human Services.

24 (12) The fact that the defendant is unfit to proceed does not preclude any objection through  
25 counsel and without the personal participation of the defendant on the grounds that the indictment  
26 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon  
27 any other ground at the discretion of the court which the court deems susceptible of fair determi-  
28 nation prior to trial.

29 **SECTION 2. This 2007 Act being necessary for the immediate preservation of the public**  
30 **peace, health and safety, an emergency is declared to exist, and this 2007 Act takes effect**  
31 **on its passage.**

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